92-227

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1992

HERNAN LONDONO-MARTINEZ
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

J. KEVIN THARPE
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## QUESTIONS PRESENTED FOR REVIEW

I. When there is an admission of evidence by the District Court of prior crimes, acts, or other wrongs, pursuant to the Federal Rules of Evidence 404(b), which are so remote in time and lack a logical connection between the past and present acts that the prejudice of admitting this evidence outweighs its probative value.

## PARTIES BELOW

Petitioner, HERNAN LONDONO-MARTINEZ, *Defendant-Appellant*.

Respondent, UNITED STATES OF AMERICA, *Plaintiff-Appellee*.

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IN THE

**Supreme Court of the United States**

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October Term, 1992

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HERNAN LONDONO-MARTINEZ
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI**

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## OPINIONS BELOW

There are no other reports of opinions delivered in this case other than the Eleventh Circuit Opinion which can be found in the Appendix at A1.

## JURISDICTION

The Per Curiam Opinions, of the United States Court of Appeals for the Eleventh Circuit, dated and entered on May 26, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The timeliness of the Petitioner's filing is governed by Supreme Court Rule 13.4.

## CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part the Fed. Rules EVID. RULE 404(b), 28 U.S.C.A. recites,

Rule 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

## STATEMENT OF THE CASE

Petitioner had been indicted in a Federal Indictment by Grand Jurors sitting in the Southern District of Florida. Defendant was named in the two-count Indictment along with defendants Alphonso Nejia-Berjarano and Jorge Alberto Luna, in an alleged conspiracy to possess with the intent to distribute cocaine, a violation of 21 U.S.C. §846 (Count I) and possession with intent to distribute cocaine, a violation of 21 U.S.C. §841(a)(1) (Count II).

Defendant was tried before a jury and convicted of both counts on or about June, 1990. The defendant was sentenced to a term of imprisonment of 121 months incarceration as to each count to run concurrently to each other on or about August 14, 1990. The defendant was also given 5 years supervised release as well as the mandatory $100 special assessment. Defendant is currently incarcerated. The defendant/appellant filed a timely Notice of Appeal in the District Court on or about April 9, 1991. The Eleventh Circuit Court of Appeals affirmed per curiam, the decision of the District Court on or about March 13, 1992. The Eleventh Circuit Court of Appeals denied the Suggestion for Hearing En Banc on or about May 26, 1992. On May 22, 1990, the Government gave notice to the Defendant/Appellant of its intent to introduce 404(b) evidence against the Defendant. On May 29, 1990, the Defendant/Appellant moved to suppress the Government's 404(b) evidence due to its remoteness in time and due to the lack of connection between the defendant's prior conduct and present conduct. The District Court judge reserved ruling on the Defendant's Motion until the 404(b) evidence was to be produced at trial. At trial, the District Court denied the Defendant's oral Motion In Limine to

prohibit introduction into 404(b) evidence. The defendant was found guilty of both counts of the Indictment.

The Government's key witness in this case was Gloria Mejia. The defendant met Ms. Mejia in New York City on or about 1982. The Defendant and Ms. Mejia had a sexual and romantic involvement thereafter. In 1989, Ms. Mejia became a confidential informant and testified for the Government against the Defendant. The Defendant had no further contact with Ms. Mejia until eight years later, where in January, 1990, Ms. Mejia unexpectedly ran into the Defendant in Coconut Grove, Florida. At that time, Ms. Mejia told the Defendant she needed to set up a drug deal in order to pay back some money to a certain individual. The two later had a meeting which was surveilled and taped by DEA agents.

The evidence sought to be introduced at trial dealt with an alleged cocaine transaction between Ms. Mejia and the Defendant in 1982 and did not involve a conviction. This evidence was admitted after the trial court denied the defendant's oral motion to exclude the 404(b) evidence.

The above Statement of the Case description illustrates the urgent need for this Honorable Court to settle the important question regarding the conflicts within the various Circuit Court of Appeals, including the Eleventh Circuit Court of Appeals, regarding the question of establishing a standard for the determination of the admissability of evidence of prior crimes, acts, or other wrongs, pursuant to the Federal Rules of Evidence 404(b) which are so remote in time that the prejudice of admitting such evidence clearly outweighs its probative value. (See Part A of Argument Below.)

The above Statement of Case description also illustrates the urgent need for this Honorable Court to settle the important question regarding the conflict within the various Circuit Court of Appeals, including the Eleventh Circuit Court of Appeals, regarding the issue of the sufficiency of continuous contacts necessary to establish a relevant nexus or logical connection between prior and present acts in determining the admissability of prior crimes, wrongs and other acts pursuant to the Federal Rules of Evidence 404(b). (See Part B of Argument Below.)

## ARGUMENT

**A. The United States Court of Appeals for the Eleventh Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court; And In So Doing, Also Rendered A Decision in Conflict With Decisions of Other Courts of Appeals on the Same Matter.**

The United States Court of Appeals for the Eleventh Circuit has rendered a decision that is squarely in conflict with the below listed decisions of other Circuits. On the issue of the remoteness of prior crimes, acts, or other wrongs pursuant to Federal Rules of Evidence 404(b) used for the conviction of the conspiracy to possess with the intent to distribute cocaine and the conviction of possession with the intent to distribute cocaine:

(1) 1st Circuit (1981): *United States v. Rodriguez*, 924 F.2d 748.

(2) 4th Circuit (1981): *United States v. Davis*, 657 F.2d 637.

(3) 5th Circuit (1980): *United States v. Jimenez*, 613 F.2d 1373.

(4) 6th Circuit (1989): *United States v. Arnold*, 890 F.2d 825.

(5) 7th Circuit (1984): *United States v. Falco*, 727 F.2d 659.

(6) 8th Circuit (1990): *United States v. Burk*, 912

F.2d 225.

(7) 9th Circuit (1991): *United States v. McCourt*, 925 F.2d 1229.

(8) 10th Circuit (1991): *United States v. Austin*, 933 F.2d 833.

(9) 11th Circuit (1982): *United States v. Dothard*, 666 F.2d 498.

This issue of establishing a standard of remoteness of time in relation to prior crimes, acts, or other wrongs pursuant to Federal Rules of Evidence 404(b) has not been addressed previously by this Honorable Court. This is an absence of a clear standard for determining whether evidence of prior crimes, acts, or other wrongs pursuant to Federal Rules of Evidence 404(b) are so remote in time, so that the prejudice of admitting such evidence greatly outweighs its probative value and encourages disparit abuse. The Eleventh Circuit as well as the other Circuits as noted, vary significantly as to any viable non-conflicting standard or test for admitting 404(b) evidence relating to remoteness of time.

Petitioner respectfully urges acceptance of review by this Honorable Court on Certiorari, to determine a clear standard in regards to a time span necessary for proper use of evidence of prior crimes, acts, or other wrongs in a non-prejudicial manner. Furthermore, this Honorable Court, in considering the above issues, is respectfully directed to:

*United States v. Engelman*, 648 F.2d 473 (8th Cir. 1981); *United States v. Spillone*, 839 F.2d 514 (9th Cir. 1989);

*United States v. Terebecki*, 692 F.2d 1345 (11th Cir. 1982);

*United States v. Messersmith*, 692 F.2d 1315 (11th Cir. 1982);
*United States v. Nabors*, 707 F.2d 1294 (11th Cir. 1982).

**B. The United States Court of Appeals for the Eleventh Circuit Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be Settled By This Court; And In So Doing, Also Rendered a Decision In Conflict With Decision of Various United States Court of Appeals On The Same Matter.**

The United States Court of Appeals for the Eleventh Circuit has rendered a decision that is squarely in conflict with the below listed decisions by various Courts of Appeals, on the issue of, whether there are a sufficient number of continuous contacts in order to establish a relevant nexus or logical connection between prior and present acts for determining the admissability of prior crimes, acts, or other wrongs pursuant to the Federal Rules of Evidence 404(b).

(1) 2nd Circuit (1987): *United States v. Peterson*, 808 F.2d 969.

(2) 9th Circuit (1991): *United States v. Hill*, 953 F.2d 452.

(3) 10th Circuit (1983): *United States v. Biswell*, 700 F.2d 1310.

(4) 11th Circuit (1983): *Osborne v. Wainwright*, 720 F.2d 1237.

This issue of the sufficiency of continuous contacts necessary to establish a relevant nexus or logical connection between prior and present acts in determining the admissability of prior crimes, wrongs, and other acts pursuant to Federal Rules of Evidence 404(b) has not been

previously addressed by this Honorable Court.

In the instant case, the District Court admitted, over objection, the prior bad act evidence relating to events 8 years before the offense charged in the indictment, in violation of Federal Rules of Evidence 404(d).

At present, there is no clear standard which establishes a relevant nexus or logical connection between prior and present acts. Consequently, there is a conflict in various Appellate Courts as to whether there are a sufficient number of continuous contacts between past and present behavior which draws a clear line between the prejudicial and probative value of prior crimes, acts, and other wrongs pursuant to Federal Rules of Evidence 404(b).

In support of the above issues, petitioner respectfully directs this Honorable Court to:

(1) 9th Circuit (1982); *United States v. Hooten*, 662 F.2d 628.

(2) 10th Circuit (1980); *United States v. Thomas*, 632 F.2d 837.

## CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari for the following reasons:

(1) To determine a clear standard/test in regards to a time span necessary for proper use of evidence of prior crimes, acts, or other wrongs pursuant to Federal Rules of Evidence 404(b) in a non prejudicial manner.

Coupled with a second prong of the test; when 404(b) sentence goes outside the established time standard:

(2) To determine a clear standard which establishes a relevant nexus or logical connection between prior and present acts; and to provide guidance as to the sufficient number of contacts which connect past and present behavior, so that the former proves the latter, and there is drawn by this Court a clear line between the prejudicial and probative value of prior crimes, acts and other wrongs pursuant to Federal Rules of Evidence 404(b).

Respectfully submitted,

J. KEVIN THARPE
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**A1**

**APPENDIX**

**OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

(Filed May 21, 1992)

No. 90-5701

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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**UNITED STATES OF AMERICA,**
***Plaintiff-Appellee,***

**v.**

**HERNAN LONDON, a/k/a Mario Londono, Londono, ALFONSO MEJIA-BEJARNO, JORGE ALBERTO LUNA,**
***Defendants-Appellants.***

---

**O R D E R**

BEFORE: FAY, *Circuit Judge*, DYER and CLARK, *Senior Circuit Judges.**

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

[x] was found guilty on count(s) one and two after a plea of not guilty.

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

A2

**JUDGEMENT OF THE UNITED STATES DISTRICT COURT**

(Filed August 23, 1990)

Case Number: 90-118-CR-MARCUS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

---

UNITED STATES OF AMERICA

V.

HERNAN LONDONO-MARTINEZ

---

JUDGEMENT IN A CRIMINAL CASE
(For Offenses Committed On or
After November 1, 1987)

J. Kevin Tharpe
Cloud H. Miller, III.
Defendant's Attorney

THE DEFENDANT:

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| *Title & Section* | *Nature of Offense* | *Count Number(s)* |
|---|---|---|
| 21 USC, 846 | Conspiracy to possess with intent to distribute at least 5 kilograms of cocaine. | One |
| 21 USC, 841(a)(1) & 18 USC, § 2 | Possession with intent to distribute at least 5 kilograms of cocaine | Two |

The defendant is sentenced as provided in pages 2 through 4 of this Judgement. The sentence is imposed pursuant to the Sentencing Reform Acto of 1984.

| | The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

| | Count(s) _____ (is) (are) dismissed on the motion of the United States.

| | The mandatory special assessment is included in the portion of this Judgement that imposes a fine.

| | It is ordered that the defendant shall pay to the United States a special assessment of $100, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgement are fully paid.

Defendant's Soc. Sec Number:
093-74-7768

Defendant's Mailing Address:
600 NE 36th Street, #814
Miami, Florida

Defendant's residence address:
Same

August 14, 1990
Date of Imposition of Sentence

/s/ Stanley Marcus,
U.S. District Judge
Name & Title of Judicial Officer

August 15, 1990
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of (121) months as to each of counts one and two to run concurrently with each other.

|x| The Court makes the following recommendations to the Bureau of Prisons: Incarceration at a facility in Florida or the Southeastern United States.

|x| The defendant is remanded to the custody of the United States Marshal.

| | The defendant shall surrender to the United States Marshal for this district,

| | at ___ a.m./p.m. on _____.

| | The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

| | before 2 p.m. on _____.
| | as notified by the United States Marshal.
| | as notified by the Probation Office.

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## RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ _____ at _____ _____, with a certified copy of this Judgement.

_____
United States Marshal

By:_____
Deputy Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) years as to each of counts one and two to run concurrently with each other.

While on supervised release, the defendant shall not commit another Federal, state of local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgement imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

| | The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit

the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgement.

# TRANSCRIPT OF SENTENCING HEARING

**Case No. 90-118-CR-MARCUS**

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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UNITED STATES OF AMERICA,
*Plaintiff,*

V.

HERNAN LONDONO-MARTINEZ,
*Defendant.*

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Miami, Florida
August 14, 1990
5:28 p.m.

TRANSCRIPT OF SENTENCE
BEFORE THE HONORABLE STANLEY MARCUS

APPEARANCES:

Plaintiff: DAVID MANDEL, ESQ.
Assistant United States Attorney
155 South Miami Avenue
Miami, Florida 33130

Defendant: YALE L. GALANTER, ESQ.
2800 Biscayne Boulevard
9th Floor
Miami, Florida 33137

(Call to order of the Court).

OFFICIAL SPANISH INTERPRETER, PREVIOUSLY SWORN.

THE COURT: Let me call the case of U.S. v. Londono, 90-118, Criminal, and ask you folks if you would be kind enough to state your appearances on the record.

MR. GALANTER: Yale Galanter on behalf of Hernan Londono, Your Honor.

MR. MANDEL: David Mandel on behalf of the United States, Your Honor.

THE COURT: And let me also indicate we have our court interpreter here who will translate for the defendant, Mr. Londono.

Have you and your client reviewed the P.S.I.?

MR. GALANTER: Yes, we have.

THE COURT: If you and he and the interpreter would approach the podium, please.

Mr. Londono, you have had the opportunity to review this presentence report, as well, with the assistance of an interpreter and discussing it with your attorney, Mr. Galanter, if that correct?

THE DEFENDANT: Correct.

THE COURT: Any corrections, additions, deletions to the P.S.I.?

MR. GALANTER: Judge, the only --

THE COURT: See, I had received some objections, but I don't know if they are still outstanding or not. So let's just take it from the top. Tell me anything you think that is wrong in the P.S.I. that you want to change, or we will go right to the grids.

MR. GALANTER: Judge, I would like to withdraw that document at this time.

THE COURT: You are talking about the objections to matters in the presentence investigative report filed on the 13th?

MR. GALANTER: Yes, Your Honor.

THE COURT: All right. Are there any changes that you want to make in the P.S.I.?

MR. GALANTER: No, Your Honor.

THE COURT: Mr. Mandel?

MR. MANDEL: No, Your Honor. None.

THE COURT: All right. Just going back to the computations, if you turn to page 6 -- really page 5 -- beginning on the bottom of page 5 under paragraph 14, and the beginning through paragraph 24, you will see the calculus is made. The base offense level is 32 given the amount of the cocaine. The Probation Department has recommended an obstruction -- an adjustment two points upward for obstruction for testifying untruthfully, bringing it to a subtotal of 34. They have also recommended that he be given credit for acceptance of responsibility as during the course the Government might wish to say as well.

MR. GALANTER: We have nothing to present, nor do we have anything to say, Your Honor.

THE COURT: I take it, Mr. Mandel -- what is the position of the United States? Are you seeking to have the defendant sentenced beyond the bottom of the guidelines, which is 12 months?

MR. MANDEL: I am not, Your Honor.

THE COURT: All right. I take it, then, your client does not wish to say anything at this point?

MR. GALANTER: No, Your Honor.

THE COURT: I should say that I intend to sentence the defendant at the low end of the guidelines here. I have considered statements of parties, reviewed the presentence report, and, of course, presided over the trial in the case.

Based on the information contained in the report, the materials presented at trial, the defendant's lack of a prior criminal record, we will sentence the defendant within, but at the low end of the guideline imprisonment range.

Furthermore, it is the finding of this Court that the defendant is not able to pay a fine, and accordingly no fine shall be imposed.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that the defendant, Hernan London, if hereby committed to the custody of the Bureau of Prisons for imprisonment for a term of 121 months. That's the bottom of the guideline level 32.

That term of 121 months is as to counts one and two of the Indictment, and those sentences are to run concurrent with each other.

Upon release from imprisonment the defendant shall be placed on supervised release for a term of five years as to each of counts one and two, again to run concurrently. And, again, that is a mandatory provision of the law.

Finally, it is ordered and adjudged that the defendant shall pay to the United States a special assessment in the amount of $50 as to each of counts one and two, which shall be due immediately, for a total assessment of $100. That, too, is a mandatory provision of the law.

I also wanted to advise your client that he has a right to take an appeal to the United States Court of Appeals for the Eleventh Circuit from the jury verdict and conviction and ensuing sentence in the case, and that if he cannot afford to pay the cost of an appeal, he may file an application to proceed in forma pauperis to proceed to have that issue waived.

Having said that, if he intends to proceed on appeal, will you be representing him or --

MR. GALANTER: Yes, Your Honor.

I have been retained to represent him on appeal. And, as a matter of fact, we have already started the work on it.

THE COURT: You will represent him for purposed of the appeal?

MR. GALANTER: Yes.

THE COURT: I just wanted to make sure that he knew of his right to appeal.

Any other issues that we have to take up at this point?

MR. GALANTER: No, Judge.

The only thing that I would ask is that you put in the judgment and conviction order a recommendation that if, at all possible, he be incarcerated at a Florida institution.

I know the Court is aware through all the pretrial hearings that his family does live here in Miami, and if there is any way they can do that, if the Court could recommend it.

THE COURT: Government, any objection?

MR. MANDEL: No objection at all, Your Honor.

MR. GALANTER: Thank you, Judge.

THE COURT: Thank you to our probation officer for his efforts as well.

(Proceedings concluded at 5:40 p.m.)